UNITED STATES
v.
RAMSHER MINING AND ENGINEERING COMPANY,
LITTLE BEAR CANYON PARK, INTERVENOR

IBLA 72-159 Decided December 3, 1973

Appeal from a decision (Contest R-2038) of Administrative Law Judge Graydon E. Holt, dated September 27, 1971, declaring the Summit Zeta Lode Mining Claims Nos. 1001-1016 null and void for lack of discovery.

Affirmed.

Mining Claims: Discovery: Generally

> Where the Government has presented a prima facie case of no discovery of a valuable mineral deposit in a contest proceeding, the burden of demonstrating a discovery by a preponderance of the evidence rests upon the contestee. Where the mining claimant fails to demonstrate such a discovery, the mining claim is properly declared invalid.

Mining Claims: Determination of Validity--Mining Claims: Mineral Surveys

> Determinations of validity are not within the ambit of authority of a mineral surveyor and the United States is not estopped from denying the validity of mining claims because of the performance of a mineral survey of the claims.

Administrative Practice--Administrative Procedure: Generally--Mining Claims: Contests

> A mining claim contest initiated under the authority of the Secretary of the Interior

may be prosecuted by counsel employed by the Department of Agriculture acting on behalf of the Forest Service where such action is in accordance with a Memorandum of Understanding between the agencies.

Administrative Procedure: Hearings--Hearings Rules of Practice: Generally

It is not prejudicial error to refuse to postpone a hearing in response to an oral request made at the hearing where there is no showing that the request is necessitated by an extreme emergency which could not have been anticipated and which justifies beyond question the granting of the postponement.

Mining Claims: Determination of Validity

The Department may inquire into the validity of mining claims and initiate a contest proceeding at any time before a patent issues.

APPEARANCES: Monta W. Shirley, Esq., Los Angeles, California, for appellant; Charles F. Lawrence, Esq., Office of the General Counsel, United States Department of Agriculture, San Francisco, California, for appellee;John M. Podlech, Esq., Pasadena, California, for intervenor.

OPINION BY MR. FISHMAN

Acting upon a written protest from the Forest Service, the Riverside District and Land Office, Bureau of Land Management, issued a contest complaint on January 29, 1969, charging that the Summit Zeta Lode Mining Claims 1001-1016 were null and void for lack of discovery. Contestee denied the charges. In addition, it affirmatively asserted that the United States was estopped from denying the validity of the mining claims by reason of Mineral Survey Number 6759, California, made by William P. Smith, a United States Mineral Surveyor, and that the Government had no jurisdiction to question the claimant's rights.

When the contest was initiated the claims were held by Foster Mining and Engineering Corporation, which was duly named as the contestee. Three days before the scheduled hearing on March 26,

1970, contestee's attorney advised that he had been unable to contact his clients and had not been paid for his services. He therefore asked to withdraw from the proceeding, and he was excused and relieved as attorney for contestee by the Judge. Contestee did not appear at the hearing. Contestant did appear and presented its case. On July 8, 1970, the President of Foster Mining and Engineering Corporation wrote to the Judge, stating that the company was unaware of the hearing or the fact that the attorney in question was to represent the company, that this information had only come to his attention as a result of a conversation which the Judge had with a Mr. Sam Sherman in the Judge's office during the previous week, and a rehearing was requested. The Judge, accordingly, ordered a rehearing of the case.

Some delay ensued, during which the depositions of several witnesses were taken by counsel for contestant. At the taking of four of these depositions, an attorney appeared on behalf of contestee. Arrangements for the production of these witnesses were made by Sam Sherman, Secretary of Ramsher Mining and Development Company and one of the witnesses. The attorney who appeared for contestee at the taking of the depositions was Lowell Ramseyer. Evidence was offered showing that the Ramsher Company was being formed to acquire the assets of contestee, the Foster Mining and Engineering Corporation.

The new hearing was set for May 14, 1971, and all concerned were duly notified. Notice of the hearing was received by Foster Mining and Engineering Corporation on March 13, 1971, such receipt being acknowledged by one Sally Sherman, who is not otherwise identified.

When the hearing convened on the appointed day Sam Sherman appeared and identified himself as Secretary-Treasurer of the Ramsher Corporation, stating that the claims at issue had been purchased by Ramsher from Foster. However, Sherman maintained that he did not represent Ramsher's interest at the hearing since he was not an attorney-at-law. He requested a continuance of the hearing for 30 to 60 days. The reason for requesting a continuance, he said, was that Mr. Ramseyer had planned to represent Ramsher at the hearing, but "something came up" and he could not. On the day before the hearing Sherman said he contacted the lawyer who had previously represented the Foster Company in this matter, but that lawyer advised Sherman that he could only take the case if the hearing could be continued. Moreover, Sherman said, the files pertaining to the case were in commercial storage and it would require two days to get the files out of storage.

Counsel for the intervenor and counsel for contestant both opposed the granting of a continuance. No continuance was granted and the hearing proceeded.

Appellant asserts that the failure to grant a continuance was prejudicial error. Referring to the rules of practice we find that the postponement of a hearing is governed by the regulation, 43 CFR 4.452-3(a),which provides:

> Postponements of hearings will not be allowed upon the request of any party or the Bureau except upon a showing of good cause and proper diligence. A request for a postponement must be served upon all parties to the proceeding and filed in the office of the Examiner at least 10 days prior to the date of the hearing. In no case will a request for postponement served or filed less than 10 days in advance of the hearing or made at the hearing be granted unless the party requesting it demonstrates that an extreme emergency occurred which could not have been anticipated and which justifies beyond question the granting of a postponement. In any such emergency, if time does not permit the filing of such request prior to the hearing, it may be made orally at the hearing.

We cannot find that appellant demonstrated proper diligence or that the requested continuance was necessitated by an extreme emergency which justified beyond question the granting of a postponement. See United States v. Dawson, 58 I.D. 670, 674-676 (1944); United States v. Carrigan, A-26158 (March 8, 1951). We note that officers of Ramsher had been aware of the contest since at least July 1970. The record indicates that the re-opening of the hearing was an accommodation to the interests of Ramsher, rather than Foster Engineering. Ramsher officials had been involved in the proceedings preliminary to the hearing, and had ample notice. No explanation was offered for the failure to make a timely request in accordance with the regulation, nor for the non-participation of Mr. Ramseyer beyond the statement that "something came up," nor was any explanation given as to why the pertinent files still had not been retrieved from storage on the day of the hearing. The interests of contestant and intervenor in concluding the matter had already been held in abeyance for considerably more than a year in order to afford appellant this opportunity to present its evidence. Under the circumstances, we cannot find that the Judge erred in failing to grant a continuance of the hearing.

Appellant also urges that the contest must be dismissed because the proceeding "has been instituted and prosecuted by the Department of Agriculture, not by the Division of Mines of the Department of the Interior." It also asserts that the evidence is insufficient to support the Judge's conclusion.

The Secretary of the Interior is charged with the supervision of public business relating to the public lands. 43 U.S.C. §§ 2, 1201, 1457 (1970). The Secretary, through the Bureau of Land Management, may inquire into rights in the public lands. He may initiate a contest in order that valid claims may be recognized, invalid ones eliminated, and the rights of the public preserved. Best v. Humboldt Mining Co., 371 U.S. 334 (1963); Cameron v. United States, 252 U.S. 450 (1920); Duguid v. Best 291 F.2d 235 (9th Cir. 1961), cert. denied 372 U.S. 906 (1963). It was within the authority of the Bureau of Land Management to initiate the contest upon the request of the Forest Service. See United States v. Dummar, 9 IBLA 308 (1973). It was further proper and in accordance with the Memorandum of Understanding between the agencies (for text see VI BLM 3.1), that the contest be prosecuted by the Office of the General Counsel, United States Department of Agriculture, in behalf of the Forest Service. United States v. Bass, 6 IBLA 113 (1972), United States v. Dummar, supra. All the proceedings were in strict coformity with the Administrative Procedure Act, 5 U.S.C. §§ 500 et seq. (1970).

Contrary to appellant's contention, the United States is not estopped from denying the validity of the mining claims because of Mineral Survey No. 6759. The function of a mineral survey is to delineate the situs of a mining claim. Determinations of validity are not within the ambit of authority of a mineral surveyor. Moreover, the Government may contest a mining claim at any time prior to actual passage of title. Cameron v. United States, supra.

After the Government introduced evidence to show that the mineralization in the several claims negated the existence of a discovery, appellants failed to demonstrate that a discovery had been made. Foster v. Seaton, 271 F.2d 836 (D.C. Cir. 1959). Instead they reiterated information, indicating the lands were mineralized. Acting on such information, it appears that appellants opened the soil at various places designated by them as "discovery" points. They selected grab samples at the so-called discovery areas. Those grab samples, in and of themselves, do not establish the potential economic feasibility of a mine. Evidence of mineralization, standing alone, does not constitute a discovery. Castle v. Womble, 19 L.D. 455 (1894). The evidence of record fully supports the Judge's decision that each of the mining claims is null and void for lack of discovery.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision below is affirmed.

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Frederick Fishman, Member

We concur:

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Edward W. Stuebing, Member

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Joseph W. Goss, Member